SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 653

FROHMAN HOLLAND, IRVING HOLLAND, HARVEY MILLER, ROBERT SAUNDERS, BERT GILBERT, on their own behalf and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

RICHMOND KOTCHER, NORTON KOTCHER, DAVID GIMPEL and JACK SACKS,

Intervenor Plaintiffs-Appellants,

MICHAEL W. CAMMAROSANO and EDWARD BRENNAN and all other officers and employees of the Borden Company;

Intervenor Plaintiffs,

against

FRANK S. HOGAN, District Attorney and SAMUEL YASGUR, Assistant District Attorney and each and every Assistant District Attorney of New York County, and SAMUEL ADLER,

Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the STATE OF NEW YORK,

Intervenor Defendant-Appellee.

PLAINTIFFS-APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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PLAINTIFFS-APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Statement

This brief is submitted on behalf of the plaintiffs-appellants herein in opposition to the Motions to Dismiss or Affirm made by counsel for all of the defendants-appellees,

Mr. Louis J. Lefkowitz, Attorney General of New York, hereinafter referred to as Attorney General, Mr. Frank S. Hogan, District Attorney of New York County, hereinafter referred to as District Attorney, and Mr. J. Lee Rankin, Corporation Counsel of the city of New York, hereinafter referred to as Corporation Counsel.

ARGUMENT

POINT I

Defendants' attempts to avoid the merits are totally without foundation.

The Attorney General and the District Attorney before discussing the substantial issues of constitutional law raised by this appeal attempt to shunt this case aside by a variety of technical means. Most of these technical objections were previously raised before the district court. They were so lacking in merit that although the district court decided, we submit erroneously, to abstain, its opinion clearly indicated the lack of merit of these technical objections. But now before this Court these arguments are trotted out again in an attempt to avoid a decision on the merits. But neither the Attorney General nor the District Attorney so much as refers to the district court's comments on these very arguments.

(a) Standing to sue

Both the Attorney General and the District Attorney, as they did in the District Court, contend that since the actions were brought by the individual milk company

executives whose exercise of their constitutional rights led to the invocation of the applicable statutes, rather than by the milk companies which were precluded from doing business with the public agencies, the plaintiffs lack standing to sue. This argument was emphatically rejected by the District Court, stating:

> "We do not believe that constitutional rights can be impaled on the horns of such a dilemma. The rule of practice which bars a litigant—even one who has suffered a 'direct substantial injury'—from asserting the constitutional rights of others is not applicable when 'outweighed by the need to protect * * * fundamental rights. * * *' *Barrows* v. *Jackson*, 346 U. S. 249, 255-58 (1953). See, e.g. *Joint Anti Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 149-154 (1951); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Truax* v. *Raich*, 239 U. S. 33 (1915). Cf. *Communist Party* v. *United States*,— F. 2d—(D.C. Cir. March 3, 1967).
>
> "If the state attaches consequences to the claim of the privilege against self-incrimination, and the consequences are sufficiently severe and immediate so that the individual's constitutional right has been violated, that right may be championed by another whose injury flows directly from the constitutional deprivation. Indeed, consideration of the personal right may become essential should its alleged impairment result in a denial of due process to the party (here, possibly, the corporation) who may suffer an immediate economic harm. Cf. *Pierce* v. *Society of Sisters, supra; Truax* v. *Raich, supra.*"

See also, *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 422-423 (1942), *Bantam Books* v. *Sullivan*, 372 U. S. 58, 64-65 fn. 6 (1963).

The opinion of the district court and the cases cited by it were totally ignored by the Attorney General and the

District Attorney. They also did not mention the numerous holdings of this Court cited above, upholding the standing to sue of a litigant whose constitutional rights are being impaired by actions ostensibly directed at another. In light of these decisions it is now manifestly futile to deny plaintiffs' standing to sue. This futility is compounded by the fact that the Attorney General is also arguing in *Campbell Painting Co:* v. *Reid,* October Term No. 673 that the corporation does not have standing to sue.

(b) Mootness with respect to the District Attorney

The District Attorney contends that irrespective of plaintiffs' remedies against defendant Samuel Adler, plaintiffs are not entitled to any injunctive relief against him as district attorney because he has done everything he intends to do. He has called all the witnesses whom he intended to threaten with Section 103-b. He has mailed all the notices he wanted to send to state and city agencies invoking Section 103-b and its sister statutes. The District Attorney thus argues the plaintiffs have no call for an injunction against him since the damage he has intended to cause has been done.

We submit that the District Attorney now cannot be heard to say the matter is moot since plaintiffs have been wronged by his actions which in fact were not even sanctioned by the applicable statutes. If nothing else, plaintiffs are entitled to an affirmative injunction ordering the District Attorney to advise all public agencies he notified of any determination that the applicable statutes are unconstitutional or that the applicable statutes were improperly invoked by him.

(c) The right to a public contract

Both the Attorney General and the District Attorney emphasize that there is no property right to a public con-

tract in New York. This may well be so. But the argument based on this was characterized by the district court as a "facile, but question-begging generalization". It also ignores the fact that the State and City are bound by the 14th Amendment from acting arbitrarily, unreasonably and capriciously even in areas where they have wide discretion.

Thus, the states have been held to constitutional standards on such discretionary privileges as public employment, *Keyishian* v. *Board of Regents*, 385 U. S. 529 (1967), *Slochower* v. *Board of Education*, 350 U. S. 557 (1956); tax exemption, *Speiser* v. *Randall*, 357 U. S. 513 (1958); unemployment compensation, *Sherbert* v. *Verner*, 374 U. S. 398 (1963); appointment as a notary, *Torcaso* v. *Watkins*, 367 U. S. 488 (1961); admission to practice law, *Spevack* v. *Klein*, 385 U. S. 511 (1967); *Schware* v. *Board of Bar Examiners*, 353 U. S. 796 (1957); continued residence in a city public housing project, *Thorpe* v. *Housing Authority*, 386 U. S. 670 (1967); and continuance as a student in a state university, *Dixon* v. *Alabama Board*, 294 F. 2d 150 (5th Cir. 1961). Manifestly, just because the State and City have some discretion in the award of public contracts does not mean that the Fourteenth Amendment safeguards are not applicable or that the State can justify any action no matter how arbitrary or how they diminish constitutional rights.

POINT II

Defendants have failed to demonstrate any reason justifying abstention.

In our jurisdictional statement we set forth a number of reasons why the district court never should have abstained in the first place. But our prime argument was that the subsequent decisions of the New York Court of

Appeals in *Gardner* v. *Broderick,* 20 N. Y. 2d 227 (1967), appeal pending, No. 635 Oct. Term 1967, and *Campbell Painting Co.* v. *Reid,* 20 N. Y. 2d 370 (1967), appeal pending, No. 673 Oct. Term 1967, removed any ground there might have been for federal abstention. Both the Attorney General and the District Attorney substantially ignore the other arguments against abstention and concentrate on their contention that *Campbell* and *Gardner* do not obviate any need for abstention.

Their argument is hard to follow for the reason that neither ever articulates what possible future questions of New York State law are still open for decision after *Campbell* and *Gardner.* They talk about the Department of Purchase's present policy of convening a Board of Responsibility to determine whether or not to invoke Section 103-b. But *Campbell,* a case where no such procedure was followed and yet the disqualification of a bidder under a sister statute of 103-b was sustained, indicates that the Department of Purchase's procedure, so far as the Courts of New York State are concerned, is superfluous. The New York Court of Appeals has indicated that it will uphold disqualification of any bidder if one of its officers or directors had exercised his constitutional right against self-incrimination in a Grand Jury investigation covered by 103-b. Thus, following *Campbell,* any disqualification ordered by a Board of Responsibility will be sustained by the New York Courts so long as there is a finding that the bidder or one of its officers or directors exercised its constitutional right against self-incrimination before a Grand Jury. Any other finding by the Board of Responsibility will be so much surplusage.

Thus, in effect, a Board of Responsibility is given *carte blanche* to disqualify any bidder who falls within the

ambit of Section 103-b since such disqualification can be sustained simply by pointing to the exercise of the privilege against self-incrimination. In other words, there is no further question of New York law to adjudicate. At best, plaintiffs' corporations can be disqualified whenever a Board of Responsibility pleases and these corporations would have no further state remedy against such disqualification.

Moreover, the record herein amply demonstrates what is contemplated by the Department of Purchase's procedure. The example of the Dairymen's League Cooperative Association Inc. and its disqualification graphically demonstrates what is likely to happen before any Board of Responsibility and how that procedure in practice impairs the constitutional protection against self-incrimination. It would be an obvious undermining of the right against self-incrimination to subject anyone to explaining, to a Board's satisfaction, why he exercised his constitutional right. This constitutional right cannot be impaired by the State's claim of a duty of candor owing to it. For there can be a duty of candor only where there is a duty to speak. And there is no duty to speak in explanation of why one exercised the right against self-incrimination. *Hoffman* v. *United States,* 341 U. S. 479 (1951). Furthermore, if there was any issue of fact to determine it could be decided by the federal courts just as well as the state courts since abstention applies to issues of state statutory interpretation and not to issues of fact.

In this connection the motions of the three defendants are confusing as to precisely what is happening. In particular, the District Attorney's brief states (at page 9) the Department of Purchase's proceedures are "altogether independent of section 103-b". What we have here are

three specific state statutes applying by their terms to every state agency, municipal corporation and public authority in the State of New York. But, the District Attorney apparently contends that these state statutes can be disregarded by the City of New York, and instead the City can achieve the identical result mandated by the statutes through the guise of a Board of Responsibility meeting pursuant to a general local resolution. This illustrates what we meant in the jurisdictional statement when we said that plaintiffs have been continually presented with a moving target. But however much the target moves, the effect is still unconstitutional state conduct whether achieved through a statute, decision of a Board of Responsibility, or threat of a district attorney.

In this connection the Corporation Counsel argues that its procedure is constitutional and does not even mention the Court of Appeals opinion in *Campbell* which would allow the earlier procedure of automatic disqualification. We have argued at length in the jurisdictional statement why the Department of Purchase procedure is unconstitutional. But in any event, should this Court fail to act, the Department of Purchase and the multitudinous state and city agencies covered by the broad scope of the applicable statutes can in the future adopt a policy of automatic disqualification without any fear of interference by the New York State Courts. Certainly, the Corporation Counsel's prior record of changing his position every time he appeared before the court below cannot give plaintiffs any faith that Department of Purchase will consistently adhere in the future to its policy of the moment.

In summary, the New York Court of Appeals has spoken and said that under New York law any exercise of the

right against self-incrimination can disqualify a bidder on a public contract. With such a holding there is no reason to abstain further. The sole remaining issue of law is whether such a rule is constitutional and this issue is tendered to this Court by this appeal.

POINT III

The questions presented are substantial.

All three defendants contend that the issues presented are not substantial. Of course such contentions fly in the face of the explicit words of the district court to the contrary. But defendant's argument has other flaws. They all rely on a number of cases decided before this Court's opinions in *Spevack* v. *Klein*, 385 U. S. 511 (1967) and *Garrity* v. *New Jersey*, 385 U. S. 493 (1967). But the continued validity of these cases was specifically questioned by this Court in *Spevack* when it said at fn. 2

> "We do not stop to re-examine all the other prior decisions of that vintage [before this Court's decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964)] to determine which of them, if any, would be decided the other way because of 'the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to *suffer no penalty* • • • *for such silence*', as declared in *Malloy* v. *Hogan*." (Emphasis added by this Court.)

Moreover, the *Spevack* decision specifically overruled an earlier decision of this Court, *Cohen* v. *Hurley*, 366 U. S. 17 (1961), stating that while not overruled by *Malloy* v. *Hogan*, "the majority indicated that the principle upon which it rested had been seriously eroded." As a conse-

quence the precedential value of any pre-*Malloy* case has been greatly vitiated.

Further, this Court has never decided, either before or after *Malloy*, any case on the right of a state to impair the privilege against self-incrimination of a public contractor.

All three defendants hold that *Spevack* does not apply to public officials although that opinion simply states that this Court is not ready to decide that issue. Then, based upon this most dubious premise, defendants supported by absolutely nothing, state that a public contractor resembles a public employee more than he does a state licensee, such as a lawyer. If anything, an independent businessman, contracting with a state, is more clearly akin to an independent attorney licensed by a state. We submit that the question of the constitutional rights of private businessmen, who seek public contracts, are too substantial to be left to vague inferences and inexact analogies, and hence should be decided by this Court after plenary consideration, including briefs on the merits and oral argument.

Incidentally in our jurisdictional statement we discussed at length why the Department of Purchase procedure is unconstitutional. These arguments were ignored by the defendants, except for the Attorney General's statement that our argument is "astounding" without ever stating why (at page 8).

The unconstitutionality of section 103-b is in fact demonstrated by all three defendants' briefs. They all contend that section 103-b is needed as a club to obtain incriminating Grand Jury testimony from officers and directors of public contractors and to penalize any public contractor who refuses to give evidence against himself before a Grand Jury investigating possible violations of the New York Penal Law. (No other gloss can be put

upon the Grand Jury investigation by virtue of the fact that the Grand Jury has power to grant immunity to witnesses appearing before it.) It is not an investigation "by Government buyers", (See Corporation Counsel's brief, page 8) as neither the Department of Purchase or any other governmental agency is directly involved in the investigation. Hence, it cannot be justified as an attempt of a governmental agency to protect itself. Rather it can only be defended for what it is, an attempt to obtain by coercion self-incriminating testimony for use directly against a reluctant witness in a criminal proceeding. We submit that at the least such a radical departure from the principles of the Fifth and Fourteenth Amendments requires full consideration by this Court.

CONCLUSION

For all the reasons stated herein and in plaintiffs' jurisdictional statement, the appeal here raises substantial issues requiring plenary consideration by this Court with briefs on the merits and with oral argument for their resolution.

Dated: New York, New York
November 27, 1967

Respectfully submitted,

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